

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 25, 2006 Session

**STATE OF TENNESSEE ex rel. AMY W. SMITH v.
CHRISTOPHER VIA**

**Appeal from the Juvenile Court for Anderson County
No. J-21310 Patricia Hess, Judge**

No. E2004-02985-COA-R3-CV - FILED JUNE 23, 2006

The State of Tennessee (the “State”) filed this lawsuit on behalf of Amy W. Smith (“Mother”) against Christopher Via (“Father”) seeking current child support payments as well as arrearages. After a DNA test confirmed that Father was the biological father of the child, the Juvenile Court ordered Father to begin making current child support payments. This appeal involves the Juvenile Court’s determination that Father also should be required to pay child support arrearages in the amount of \$34,963 dating back to the child’s birth in April of 1992. Following a trial, the Juvenile Court credited the testimony of Mother over the testimony of Father in determining when Father knew of the existence of the child and that Father should be required to pay arrearages pursuant to Tenn. Code Ann. § 36-2-311(a)(11). Father appeals, and we affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Juvenile Court Affirmed; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and CHARLES D. SUSANO, JR., J., joined.

Roger A. Miller, Clinton, Tennessee, for the Appellant Christopher Via.

Paul G. Summers, Attorney General and Reporter, and Warren Jasper, Assistant Attorney General, Nashville, Tennessee, for the Appellee State of Tennessee *ex rel.* Amy W. Smith.

OPINION

Background

This appeal concerns a determination by the Juvenile Court that Father was required to pay child support arrearages totaling \$34,963 dating back to the birth of the parties' child in April of 1992. This litigation began in August of 2003 when the State filed a Petition to Establish Paternity on Mother's behalf. The State claimed in the petition that Father was the biological father of the child and that he was liable for past and current child support. Father responded to the petition and denied he was the biological father of the child. Father further claimed that even if he is the biological father, he is not legally obligated to pay any past child support because he never knew of the existence of the child.

In December of 2003, the parties agreed to submit to DNA testing. The DNA test results established a 99.99% chance that Father is the biological father of the child. Father then was ordered to begin making child support payments. Father continued to maintain that he should not be required to pay any child support arrearages because he did not know of the existence of the child until about a year before the hearing. Accordingly, a trial was held in August of 2004 to resolve this issue. While this Court has not been provided a transcript from the trial, we have been provided with a statement of the evidence in accordance with Tenn. R. App. P. 24(c), which was approved by the Juvenile Court Judge. The statement of the evidence, as amended, provides in relevant part as follows:

2. The matter arose from a Petition for Paternity. A parentage test revealed Christopher Via to be the father of Brittany Smith (born April 15, 1992) with certainty far in excess of 99%.

3. The primary issue addressed at the hearing of this matter was retroactive child support.

4. Evidence of Mr. Via's income from IRS records indicated that child support was properly set at \$300 per month. The State requested the court set retroactive support back to the child's date of birth at \$300 per month retroactive 148 months. Total retroactive support requested was \$44,000. The State further requested that payments on retroactive support be set at \$75 per month....

6. Mr. Via testified that he knew nothing of his child Brittany until about a year prior to the hearing when he received an order to take a paternity test. He further testified that he had not seen the child until the August hearing.

7. Mr. Via testified that he met Ms. Smith through his cousin. They met at Mr. Via's grandmother's house where he was living sometime in 1991. On the night they met, Brittany was conceived.

8. He testified that he had had no contact with Ms. Smith since that night in 1991, other than an encounter a few months prior to the August hearing. He further testified that Ms. Smith had never tried to contact him; nor had members of Ms. Smith's family.

9. Mr. Via later testified that he knew in February 2003 that someone was claiming he was the father of Brittany.

10. Mr. Via claims living at four, possibly five, residences since the night of the encounter with Ms. Smith in 1991 at his grandmother's house. He also spent eight and one-half months in the Anderson County Jail.

11. Mr. Via has had at least thirteen jobs since 1992, mostly in the area of Knoxville and Anderson County. He obtained work primarily through temporary agencies. Mr. Via's numerous residences and jobs made it difficult to locate him for any purpose, including that of providing service of summons or other notice of legal proceedings.

12. Ms. Smith testified that after Brittany was born, *she* next saw Mr. Via at his grandmother's house where she had taken Brittany in May of 1992 after her birth. At the time, Brittany was approximately three weeks old. (emphasis in original)

13. Ms. Smith testified that during this encounter in May of 1992, upon being told that Brittany was his child, Mr. Via told Ms. Smith that he had no children, and that if he had children, that he would kill them. There were no objections to this testimony at the hearing of this matter.

14. Ms. Smith testified that she did not attempt to make further contact thereafter with Mr. Via because of this threat. Ms. Smith did not see Mr. Via after May 1992....

16. In December of 1993, Ms. Smith completed an affidavit of paternity in which she stated that Mr. Via did not know about the child.

17. However, she stated that at the time she completed the affidavit, she was still concerned and frightened about the threat made against her and against Brittany's life.

18. Mr. Via's grandmother testified she had poor memory of events so long ago but she otherwise corroborated Mr. Via's testimony about the child. She also stated she had no knowledge of Mr. Via's drug activity until police appeared at her door to arrest him.

19. Judge Hess weighed the evidence at the hearing and stated that any determination of retroactive child support depended upon the credibility of the witnesses before her who gave conflicting testimony. She stated at the hearing that she found the mother's (Ms. Smith's) testimony credible on the issue of the threats made against her and her child and the fear it elicited, and on the issue of when she next encountered Mr. Via approximately three weeks following Brittany's birth. Accordingly, she ordered an award of retroactive child support back to the date of Brittany's birth based upon his income between the time of birth and the August hearing date, considering any credit deserved for support paid to another child from a subsequent marriage under a support order.

Relying on the evidence introduced at trial and in light of its specific credibility determination, the Juvenile Court concluded that pursuant to Tenn. Code Ann. § 36-2-311(a)(11), Father was responsible for child support arrearages and thereafter calculated the amount of those arrearages at \$34,963. Father was ordered to pay current child support at the rate of \$285 per month, plus an additional \$70 per month toward the arrearages. Father appeals claiming the Juvenile Court erred when it ordered him to pay retroactive child support.

Discussion

The factual findings of the Juvenile Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted "under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts." *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

Tenn. Code Ann. §36-2-311(a)(11) addresses awards of retroactive child support in paternity actions. This statute provides, in relevant part, as follows:

(A) Determination of child support pursuant to chapter 5 of this title. When making retroactive support awards pursuant to the

child support guidelines established pursuant to this subsection (a), the court shall consider the following factors as a basis for deviation from the presumption in the child support guidelines that child and medical support for the benefit of the child shall be awarded retroactively to the date of the child's birth:

(i) The extent to which the father did not know, and could not have known, of the existence of the child, the birth of the child, his possible parentage of the child or the location of the child;

(ii) The extent to which the mother intentionally, and without good cause, failed or refused to notify the father of the existence of the child, the birth of the child, the father's possible parentage of the child or the location of the child; and

(iii) The attempts, if any, by the child's mother or caretaker to notify the father of the mother's pregnancy, or the existence of the child, the father's possible parentage or the location of the child.

(B) In cases in which the presumption of the application of the guidelines is rebutted by clear and convincing evidence, the court shall deviate from the child support guidelines to reduce, in whole or in part, any retroactive support. The court must make a written finding that application of the guidelines would be unjust or inappropriate in order to provide for the best interests of the child or the equity between the parties.

(C) Deviations shall not be granted in circumstances where, based upon clear and convincing evidence:

(i) The father has a demonstrated history of violence or domestic violence toward the mother, the child's caretaker or the child; ... [or]

(iii) The mother or caretaker of the child, or the child has a reasonable apprehension of harm from the father or those acting on his behalf toward the mother, the child's caretaker or the child; ...

Tenn. Code Ann. § 36-2-311(a)(11).

Father's primary argument is that due to Mother's inconsistent affidavit and trial testimony, she simply is not worthy of belief and the Juvenile Court, therefore, erred when it credited Mother's testimony over the testimony of Father. To be sure, Mother's testimony was inconsistent with her earlier affidavit. In 1993, Mother swore via affidavit that Father had no knowledge of the existence of the child. At trial, Mother's version of events changed and she testified that Father did in fact know of the existence of the child only a few weeks after the child was born. Mother explained the inconsistency by claiming Father had threatened the child's life when she told Father he was the child's biological father, and because of this threat Mother did not want Father to have any contact with the child or otherwise be a part of the child's life. Father testified this never happened.

The Juvenile Court thus was confronted with contradictory testimony and was required to decide whether Mother's testimony at trial was truthful. If the Juvenile Court accepted Mother's trial testimony, that testimony explained her prior inconsistent affidavit. The Juvenile Court was quite aware of Mother's inconsistent affidavit and obviously took that into account when rendering a decision. Contrary to Father's assertion on appeal, simply because Mother testified inconsistently with her earlier affidavit does not mean, as a matter of law, that her testimony at trial could not be believed. Based upon all the witness' testimony, including Father's and Mother's testimony, his and her demeanor at trial, etc., the Juvenile Court found that Father was made aware shortly after the child's birth that he was the child's father, that Father then threatened the child's life, and that Mother's fear caused by this threat resulted in Mother's affidavit to the effect that Father was not aware of the child.

In *Wells v. Tennessee Bd. of Regents*, our Supreme Court observed:

Unlike appellate courts, trial courts are able to observe witnesses as they testify and to assess their demeanor, which best situates trial judges to evaluate witness credibility. *See State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990); *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). Thus, trial courts are in the most favorable position to resolve factual disputes hinging on credibility determinations. *See Tenn-Tex Properties v. Brownell-Electro, Inc.*, 778 S.W.2d 423, 425-26 (Tenn. 1989); *Mitchell v. Archibald*, 971 S.W.2d 25, 29 (Tenn. Ct. App. 1998). Accordingly, appellate courts will not re-evaluate a trial judge's assessment of witness credibility absent clear and convincing evidence to the contrary. *See Humphrey v. David Witherspoon, Inc.*, 734 S.W.2d 315, 315-16 (Tenn. 1987); *Bingham v. Dyersburg Fabrics Co., Inc.*, 567 S.W.2d 169, 170 (Tenn. 1978).

Wells v. Tennessee Bd. of Regents, 9 S.W.3d 779, 783 (Tenn. 1999).

The Juvenile Court was required to make a credibility determination and it did just that. There is no clear and convincing evidence to the contrary as to the Juvenile Court's assessment of witness credibility, and we, therefore, affirm the Juvenile Court's decision to credit the testimony of Mother over that of Father.

Having affirmed the Juvenile Court's credibility determination, we find that Father failed to rebut the presumption of the application of the child support guidelines. Rather, the evidence contained in the record shows that Father did know of the existence of the child shortly after the child's birth.

Additionally, because we have affirmed the Juvenile Court's credibility determination, it necessarily follows that there was clear and convincing evidence that: (1) Mother had good cause not to contact Father after the threat was made; and (2) Mother had a reasonable apprehension of harm from Father toward Mother and/or the child. Under these facts, Tenn. Code Ann. § 36-2-311(a)(11)(A) & (C) would preclude the Juvenile Court from deviating from the child support guidelines by reducing or eliminating any arrearages that accrued after the child was born.

Conclusion

The judgment of the Juvenile Court is affirmed and this cause is remanded to the Juvenile Court for collection of the costs below. Costs on appeal are assessed against the Appellant, Christopher Via, and his surety.

D. MICHAEL SWINEY, JUDGE